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Supreme Court, U.S.
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No. _____

SUPREME COURT OF THE UNITED STATES

October Term, 1996

Joseph P. Boltach, Petitioner
v
Dexter Township, Respondent

Abraham V. Williams, Jr., Petitioner
v
Dexter Township, Respondent

On Petition for a Writ of Certiorari to the
Michigan Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

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August, 1996

14 pp

Questions Presented

Does a state deprive citizens of their Fourteenth Amendment right to due process when its courts affirm a local government act after repeatedly refusing citizen requests to determine whether the local government act is or is not unconstitutional under several clauses of both federal and state constitutions?

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Joseph P. Boltach and Abraham V. Williams Jr. respectfully petition for a writ of certiorari to review the judgment of the Michigan Court of Appeals in this case.

Opinions Below

None of the opinions entered below have been published.

Jurisdiction

The Michigan Court of Appeals entered its judgment on March 10, 1995. The Michigan Supreme Court denied leave to appeal on March 29, 1996 and denied Petitioners' motion for reconsideration on June 18, 1996.

The jurisdiction of this court is invoked under US Const, art III §§ 1, 2 and 28 USC § 1257(a).

Constitutional And Statutory Provisions Involved

United States Constitution

ARTICLE VI SECTION 2

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; ... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

ARTICLE VI SECTION 3

... all executive and judicial Officers .. of the several States, shall be bound by Oath or Affirmation, to support this Constitution...

AMENDMENT XIV

... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

AMENDMENT V

No person shall ... be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Michigan Constitution

Article 6 § 28

All final decisions, findings, rulings and orders of any administrative officer or agency existing under the constitution or by law, which are judicial or quasi-judicial and affect private rights or licenses, shall be subject to direct review by the courts as provided by law. This review **shall** include, **as a minimum**, the determination whether such final decisions, findings, rulings and orders are authorized by law; and, in cases in which a hearing is required, whether the same are supported by competent, material and substantial evidence on the whole record. ... [Emphasis added].

Article 1 § 1

All political power is inherent in the people. Government is instituted for their equal benefit, security and protection.

Article 1 § 2

No person shall be denied the Equal Protection of the laws; ...

Article 1 § 17

No person shall ... be deprived of life, liberty or property, without due process of law. ...

Article 10 § 2

Private property shall not be taken for public use without just compensation therefore being first made or secured in a manner prescribed by law. ...

Michigan Statues

MCL § 205.735

A proceeding before the tribunal shall be original and independent and shall be considered de novo. ...

MCL § 205.753(1)

Subject to section 28 of article VI of the state constitution of 1963, ... an appeal from the tribunal's decision shall be by right to the court of appeals.

Statement Of The Case

The Principle Case

Owners of 18 properties filed petitions in the Michigan Tax Tribunal challenging the constitutionality and statutory authority of Dexter Township's Special Assessment Resolution Number 3. Petitioners claimed, among other things, that the assessment resolution violated federal and state constitutional guarantees of due process and just compensation. Petitioners' Appendix [PA], pp 22a - 35a.

During opening argument, Petitioners' attorney Joel Welber stated:

> "We are not challenging the statutory basis for the inclusion of these Petitioners under Public Act 145, as opposed to Public Act 233. And the technical arguments that we previously raised in our petition, are not being pursued at this point." PA p 36a.

That statement was intended to dispose of the technical issues raised in counts 1 though 3 of Petitioners' Amended Petition. Referring next to counts 4 through 6, Mr. Welber continued:

> "But we will prove a more important proposition. Specifically, that these Petitioners should not substantively be included in this sewer project under any statute.

"Petitioners contend, and we will prove, that there is no rational basis for the inclusion of these Petitioners in this sewer and that, at the time of the confirmation of the sewer assessment district, the Dexter Township Board of Trustees neither adopted nor employed any rational standard under which the Petitioners would be so included.

* * *

"Petitioners will further prove that they will receive no special benefit that is required to justify the assessment as a matter of law.

* * *

"Petitioners will further show that even within the assessment district, the benefits are improperly allocated for at least two reasons.

"The first reason, is that ... identifiable properties which will benefit disproportionately to other ... identifiable properties, are assessed at the same rate. And this is legally impermissible.

"Second, and more crucially, no portion of the cost of this project has been allocated to the general public, not withstanding a clear public benefit that will be repeatedly proven through the testimony." PA pp 39a - 36a.

After the close of 6 and a half days of hearings, written closing arguments were filed by both parties. Petitioners argued the points raised by counts four *through six, and discussed* the Equal Protection issue made evident thereby. PA pp 39a - 41a.

The Michigan Tax Tribunal hearing officer ruled that Michigan's common law prohibited him from reviewing the constitutionality of a special assessment until and unless Petitioners first proved a specific amount of economic harm:

> "This hearing officer also cites and considers herein the 4 to 3 Supreme Court decision in **Dixon Road Group** v **City of Novi**, 426 Mich 390; 395 NW2d 211 (1986) wherein the majority recognized that:
>
> > "decisions made by municipalities with respect to special assessments generally should be upheld. This court will intervene where there is a substantial or unreasonable disproportionality between the amount assessed and the value which accrues to the land as a result of the improvement. The cost of the improvements is approximately 2.6 times the increase in the value of the properties. **Dixon**, **supra**, page 403." PA p 12a.

The hearing officer's findings of fact do not include a determination of any petitioners' burden. PA pp 4a - 9a. The hearing officer's findings of fact do not include a determination of any petitioners' benefit. Id. The hearing officer's findings of fact do not include a determination of the amount by which the burden exceeds the benefit for any petitioner. Id. Instead, under "Conclusions of Law", the hearing officer wrote:

> "Special assessment determinations are peculiarly legislative in nature and within the purview of local authorities, absent fraud, mistake or abuse of discretion (such that produces a disproportionate result per **Dixon**, **supra**) none of which appear in the facts of this case. Therefore, having determined petitioners' properties were specially benefited and that no fraud, mistake or abuse of discretion that adversely affected any of the petitioners herein, it is concluded that the special assessments herein should be affirmed. PA p 16a. (Parenthetical comment in the original).

Both sides filed objections to the hearing officer's proposed judgment. Petitioners reasserted their unanswered constitutional claims. Petitioners also argued that the hearing officer applied an incorrect standard of review and changed the burden of proof after the hearing. PA p 42a

A three member Michigan Tax Tribunal panel incorporated the hearing officer's proposed judgment as its final judgment without opinion or other comment. PA p 3a.

The Appellate Case

Petitioner's timely filed a claim of appeal, realleging the unanswered claims of federal and state constitutional error and the Michigan Tax Tribunal's use of an incorrect standard of review and incorrect burden of proof. PA pp 43a - 44a.

Dexter Township moved to summarily affirm the special assessment based on the Michigan Supreme Court's decision in **Kadzban** v **Grandville**, 442 Mich 495; 502 NW2d 299 (1993), to uphold the use of a presumption of validity in special assessment cases. PA p 45a. The Michigan Court of appeals denied the motion:

> "for failure to persuade the Court that it is manifest that the questions to be reviewed are so unsubstantial as to need no argument or formal submission or were not properly raised." PA p 18a.

Nevertheless, a different panel of the Michigan Court of Appeals later affirmed the special assessment, ruling:

> "We hold that the constitutional issues raised on appeal by petitioners were abandoned below." PA pp 1a -2a.

The court's sole offer of justification for the finding was:

> "In the Tax Tribunal, petitioners affirmatively announced that they would not pursue 'the technical [constitutional] arguments' raised in their petition." Id.

Petitioner's moved for rehearing, asserting that they did not abandon any constitutional issues and that they have a constitutional right to a review of the issues in any event. PA p 46a.

On May 30, 1995 the Michigan Court of Appeals denied the motion for rehearing without comment or opinion. PA p 19a.

Petitioner's application for leave to appeal to the Michigan Supreme Court was denied without comment or opinion on March 29, 1996. PA pp 47a, 20a.

Petitioner's motion for reconsideration was denied on June 18, 1996. PA pp 48a, 21a.

Reasons Why The Petition Should Be Granted

This case has reached the United States Supreme Court because the Michigan Courts have refused to decide whether or not Respondent's special assessment conforms to the fundamental requirements of fairness found in both the federal and Michigan constitutions. The decision to not answer the

question of whether or not the special assessment at issue is unconstitutional is clearly erroneous.

> "This Constitution, and the Laws of the *United States which shall be made in* Pursuance thereof; ... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding".
>
> ... all executive and judicial Officers .. of the several States, shall be bound by Oath or Affirmation, to support this Constitution... US Const, art VI, §§ 2 - 3.

These constitutional mandates preclude the possibility of having an adequate and independent state law ground for affirming an unconstitutional local government act. **Daniels** v **Williams**, 474 US 327, 331 (1986), **Sioux City Bridge Co** v **Dakota Cty**, 260 US 666; 43 SCt 190; 67 LEd 340 (1923), **Marbury** v **Madison**, 5 US (1 Cranch) 137; 2 LEd 60 (1803). They also show us that such a failure is not a mere legal error, but a serious offense:

> "Thus, the particular phraseology of the Constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and that courts, as well as other departments, are bound by that instrument." Id.

Michigan used to ascribe to these principles as well:

> "That this is 'merely' a tax [case] and not one of freedom of speech, or worship, is immaterial. There are no differences in degrees of protection afforded in the constitutional safeguards. With equal alacrity we halt in [their] tracks, once [their] foot crosses the line, the inquisitor, the police[officer], the tax collector, the legislature, or the executive. Our question is not how far [they have] passed over the forbidden line, how serious [their] encroachment, or how aggravated the arrogance. Our duty arises with the trespass itself." **Alan** v **Wayne Cty**, 388 Mich 210; 200 NW2d 628, 675, 676 (1972), quoting **Lockwood** v **Comn'r of Revenue**, 357 Mich 517, 558; 98 NW2d 753, 760 (1959).

Even in the same year the Michigan Supreme Court decided the **Dixon** case, it also affirmed the basic law:

> "Although ***Sioux City*** is factually dissimilar to the instant cases, the broader proposition for which it stands is clearly apposite. When faced, as in this case, with a choice between securing that which is due under the law and upholding the constitutional requirements of

> uniformity and equality, the latter is to be preferred 'as the just and ultimate purpose of the law.'" **Armco Steel Corporation** v **Dept of Treasury**, 419 Mich 582; 358 NW2d 839, 844 (1984), quoting and paraphrasing **Sioux City Bridge** at US 446-447.

At least until 1984, Michigan was in accord with the People of the United States in believing that the most important function to be served by the Michigan judicial system was to protect its citizens from the well intended but nevertheless overreaching acts of government.

However, in 1992, the Michigan Tax Tribunal determined that Michigan common law prevented it from determining whether or not the special assessment at issue violated the constitution as alleged. The case cited, **Dixon Road Group** v **City of Novi**, 426 Mich 390, 403; 395 NW2d 211 (1986), clearly does require a tribunal hearing officer to begin with a bias rather than to perform an original and independent review of the issues considered de novo as the Michigan Tax Tribunal act requires. **Dixon**, at 403, MCL 205.735.

Dixon did not discuss the statute's standard of review nor its impact upon an old common law presumption applied to cases tried in equity. **Dixon** did not discuss whether all constitutional errors were to be ignored, or if it was only minor dollar value

differences in a takings analysis that it would not "trifle" with.

When the Michigan Tax Tribunal adopted the hearing officer's proposed judgment without so much as a word about **Dixon**, MCL 205.735 nor Const 1963, art 6, § 28, the duty fell upon the Michigan Court of Appeals on an appeal of right. PA pp 1a - 2a, MCL 205.753(a), Const 1963, art 6 § 28.

The Michigan Supreme Court revisited the presumption of validity question in the context of special assessments about one year after the Michigan Tax Tribunal hearing officer relied on **Dixon**. In **Kadzban** v **Grandville**, 442 Mich 495, 502, 505; 502 NW2d 299 (1993), the court said "special assessments are to be presumed valid". However, the statutory and constitutional standard of review was not discussed. It should be noted that the Michigan Supreme Court did hold that:

> "Of course, the question whether and how much the value of land has increased as the result of certain improvements is factual, to be determined on the basis of evidence presented by the parties." **Kadzban**, p 502.

And further, that

> "Of course, after plaintiffs present evidence effectively rebutting the presumption of validity, the burden of going forward with evidence shifts to the city. [Cf omitted]. At that point, the city must, under

> Dixon Road, present evidence proving that the assessments are reasonably proportionate in order to sustain the assessments." **Kadzban**, p 505 n 5.

Throughout the case, the focus was only upon Petitioners' 5th amendment takings claim.

Respondent asked the Michigan Court of Appeals to summarily affirm based on the **Kadzban** case. PA p 45a. The Michigan Court of Appeals declined, as stated above. PA p 18a.

A different Michigan Court of Appeals panel subsequently affirmed the Michigan Tax Tribunal. PA pp 1a - 2a. The Michigan Court of Appeals did not answer the questions the previous panel implied it should, including whether or not to rely on **Dixon**, and **Kadzban** when Const 1963, art 6 § 28 requires a review that

> "shall include, as a minimum, the determination whether such final decisions, findings, rulings and orders are authorized by law; and, in cases in which a hearing is required, whether the same are supported by competent, material and substantial evidence on the whole record." PA pp 1a - 2a.

There is no question that this constitutional provision is applicable in this case since the Michigan Tax Tribunal act says:

> "Subject to section 28 of article VI of the state constitution of 1963, ... an appeal from the tribunal's decision shall be **by right** to the court of appeals. MCL 205.753(1). Emphasis added.

Instead of taking any act that may have shown even a small amount of respect for its duty to protect Petitioners' rights, the Michigan Court of Appeals first said:

> "We hold that the constitutional issues raised on appeal by petitioners were abandoned below. In the Tax Tribunal, petitioners affirmatively announced that they would not pursue 'the technical [constitutional] arguments' raised in their petition." PA pp 1a.

We can be absolutely certain that the Dixon v constitution and statute issue was not waived during petitioners' opening statement for the obvious reason that the issue did not exist until months later. The Michigan Court of Appeals simply ignored the issue and its duty to resolve it.

There is only one way the court could have honestly misunderstood the sentence fragment it

quoted out of context. That way would be to have not read the whole opening argument. The very next words to follow the sentence the Michigan Court of Appeals misinterpreted says:

> "But we will prove a more important proposition. ...
>
> "Petitioners contend, and we will prove, that the ... Dexter Township Board of Trustees neither adopted nor employed any rational standard ...." PA p 36a.

Such a claim easily explains the relevance and admissibility of questions asked of Respondent's Board Supervisor Jim Drolett and his replies:

> Q: ... [W]hat standards did you, yourself, employ, in working with McNamee Porter and Seeley?
>
> A: ... I used what appeared to be logical boundaries ... Trial Transcript, pp 512 - 513.

This was not an isolated question. Petitioners asked all but one of Respondent's board members whether or not a standard was developed.

> Q: So, do you remember yourself, participating in a process of designing specifications or instructions for these parties to use?
>
> A: No. Treasurer, TT p 950.

Also,

Q: There was no guidelines prepared, no directives, isn't that correct?

A: I don't believe there were any written directives or anything like that. Clerk, TT p 1156.

One trustee mentioned that vacant lots would receive a sewer tap, TT p 1232. Petitioners forgot to present the question to one trustee. The standards issue was presented far more extensively than these quotes suggest. However, Petitioners are not asking the United State Supreme Court to decide a simple question of fact. These samples are designed only to show that anybody who reads the trial transcript will know that whether or not standards were developed was at issue during the hearing.

Consequently, if the Michigan Court of Appeals holding of abandonment was honest in fact, then it is certain that the panel was unaware of Petitioners' whole opening statement and the rest of the trial transcript's contents. To be that unaware, the Michigan Court of Appeals would have had to abandon Petitioners' claims of error **before** deciding whether or not Petitioners did.

The Michigan Court of Appeals follows its claim of "abandonment" with:

> "We are not convinced that a miscarriage of justice would occur were we not to rule upon these unpreserved issues. [state cites omitted]." PA p 1a.

As a matter of law, the truth of that statement depends on whether or not the special assessment at issue is or is not unconstitutional, since it is well established above that a miscarriage of justice is inherent in every unconstitutional local government act. US Const, art VI, § 2. **Marbury**. That is why the people ordered state court judges to take an oath to strike down unconstitutional laws. US Const, art VI, § 3.

Either the Dexter Township Board did or did not develop standards. Either the Dexter Township Board did or did not place the burden for a public improvement upon the shoulders of a small percentage of the people who receive the benefit. Either the Dexter Township Board's flat rate special assessment does or does not vary from property to property in some reasonable relationship to the way the individual property values will rise or fall as a result of the improvement.

If the Court of Appeals had an honest interest in whether or not a miscarriage of justice would occur, there was one excellent way to find out. All the court needed to do was compare the evidence to the law. There are sixteen hundred pages of transcript and 40 some exhibits to guide an independent trier of fact. There are nearly a dozen of briefs in the record. All that is needed now is what has been needed since May, 1989: an original, independent review of

Petitioners' specific claims of error considered de novo, having due regard of the evidence of actual fact. Instead, the Michigan Court of Appeals went to extremes to avoid that task.

Whether the requested review should be performed solely because it is the right thing to do, or should be performed because Petitioners have several constitutionally protected rights to the review, or should be performed because the Michigan Court of Appeals needs to know whether or not a substantial miscarriage of justice will occur, the review still should be performed. As it stands now, neither party has a court order resolving any of Petitioners' long standing claims of error. Therefore, unless Respondent makes no effort to enforce its unconstitutional assessment, this case will remain open, perhaps with a different caption, until the issues are reviewed. Both sides need an order that at least looks like an honest effort to answer each one of Petitioners' claim of error. Once that job is done, this case will probably be as good as closed.

Further more, there are indications that the special assessment at issue in this case has been "at issue" for as long as it has because Michigan may no longer believe that it is duty bound in special assessment cases to "halt in their tracks" government officials who cross the line. The Michigan Supreme

Court has ordered the Michigan Tax Tribunal to begin with an unconstitutional, pro-validity bias in the two recent cases of **Dixon** and **Kadzban**. The Michigan Tax Tribunal carried that presumption of validity to an issue-precluding extreme. The Michigan Court of Appeals went to great lengths to avoid having to learn whether or not the underlying special assessment is void. The Michigan Supreme Court did nothing when faced with the opportunity to perform an extremely important governmental duty. Each of those decisions were made not withstanding their violation of both the spirit and the letter of fundamental constitutional law. Each of these actions result in the continued existence of a special assessment resolution that cannot possibly survive the least intense constitutionally required scrutiny, even if the review begins with a presumption of validity.

Conclusion

Therefore, Petitioners ask this honorable court to grant this petition for a writ of certiorari and to exercise its Article III power to take any other action it deems necessary and proper to ensure, as a minimum, that Petitioners' claims of error are ultimately reviewed as due process requires, and to ensure that Michigan and other states accept and execute their duty to review future special assessments.

Respectfully Submitted,

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State Of Michigan
Court Of Appeals

UNPUBLISHED
MARCH 10, 1995

JOSEPH BOLTACH,
ANITA BOLTACH,
and ABRAHAM V WILLIAMS, JR., et. al.
Petitioners-Appellants,

v

DEXTER TOWNSHIP,
Respondent-Appellee.

Docket Numbers

155781 & 156507

Before: Taylor, P.J., and Griffin,
and W.G. Schma[1], JJ.

MEMORANDUM.

Petitioners appeal as of right an order of the Tax Tribunal affirming a special assessment adopted by respondent township. We affirm.

We hold that the constitutional issues raised on appeal by petitioners were abandoned below. in the Tax Tribunal, petitioners affirmatively announced that they would not pursue "the technical [constitutional] arguments" raised in their petition. We are not convinced that a miscarriage of justice would occur were we not to rule upon these unpreserved issues.

---

[1] Circuit judge, sitting on the Court of Appeals by assignment.

People v Evola, 202 Mich App 178, 180; 507 NW2d 815 (1993), lv den 445 Mich 931 (1994); Petrus v Dickinson Co Bd of Comm'r, 184 Mich App 282, 288; 457 NW2d 359; lv den 435 Mich 879 (1990).

As to the factual findings made by the tribunal, we find such findings supported by competent, material, and substantial evidence on the whole record. Const 1963, art 6 § 28 and Meadowlanes Limited Dividend Housing Ass'n v Holland, 437 Mich 473, 482; 473 NW2d 636 (1991). We therefore affirm.

Affirmed.

/s/ Clifford W. Taylor
/s/ Richard Allen Griffin
/s/ William G. Schma

State Of Michigan
Michigan Tax Tribunal

Laurence Baughn, et al.
Petitioner

v

Dexter Township
Respondent

Docket Numbers

124693 through 123709

Opinion And Judgment

Tribunal Judge Present
Thomas J. Hughes

This matter having come on before Hearing Officer James R. Neumann, and a Proposed Judgment having been issued on June 5, 1992, from which exceptions and written arguments thereto were filed, and

The Tribunal, pursuant to Section 26 of the Tax Tribunal Act, as amended by 1980 PA 437, having considered all matters raised and being fully familiar in the premises, does hereby adopt and incorporate by reference the findings of fact and conclusions of law in the said Proposed Judgment as the final decision of the Tribunal.

No costs, a question of public importance.

MICHIGAN TAX TRIBUNAL

By /s/ Thomas J. Hughes

Entered: August 11, 1992

State Of Michigan
Michigan Tax Tribunal
June 5, 1992

Joseph P. and Anita Boltach,
Abraham V. Williams, Jr., et. al.
Petitioners — Docket Numbers
v
Dexter Township, 214693 through 124709
Respondent

Proposed Opinion And Judgment

Hearing Officer Presiding
James R. Neumann

Findings of Fact

These consolidated matters came on for hearing at 9:00 A.M. on May 29, 1991 in the Lansing, Michigan hearing rooms of the Tax Tribunal. The hearing continued for six days, through June 5, 1991, and was adjourned to permit petitioners and opportunity to obtain additional information regarding valuation. The hearing reconvened August 29, 1991 and concluded following new testimony of Appraiser Schuur. Arguments and briefs were filed during October and November, 1991.

Petitioners were represented by Joel S. Welber, attorney at law, and respondent was represented by Peter C. Flintoft, attorney at law. Between them, 17 witnesses were called to testify, as follows: (1) Barry Johnson, Director, Washtenaw County Environmental

Health Bureau; (2) Michael Morehouse, inspector, Washtenaw county Environmental Health Bureau; (3) Hendrik Schuur, appraiser with Gerald Alcock Co.; (4) James Drolett, township supervisor; (5) Robert Engel, home builder; (6) Lawrence Baughn, petitioner; (7) Abe Williams, petitioner; (8) Anita Boltach, petitioner; (9) Julie Knight, township treasurer and township trustee; (10) Earl Doletsky, township trustee; (11) Alison Bruno, petitioner; (12) Mary Ann Hitchcock, petitioner; (13) Nelson McCormick, petitioner; (14) William A. Eisenbeiser, township trustee; (15) Douglas Smith, township trustee; (16) Doris Breijak, petitioner; (17) Raymond J. Smit, engineer and CEO of McNamee, Porter and Seeley Engineering. Also petitioners introduced 31 exhibits and respondent introduced 13 exhibits, all of which are a part of the record in these matters.

These appeals involve special assessments levied by Dexter Township, Washtenaw County, for sanitary sewers in the area around and near Portage Lake. This total special assessment project includes Portage and Base Line Lakes in an intercounty district involving Webster and Dexter Township in Washtenaw County and Putnam and Hamburg Township in Livingston County.

The total project includes about 1100 existing residential units with about 200 additional units projected as beneficiaries of the sewer project. About 425 taps are allocated to Dexter Township (apparently actually 412 taps). The project includes the construction of a waste water treatment facility with permits providing for 240,000 gallons of discharge per

day. The assessment per sewer tap (benefit) is $7000 and each living unit within the district is required to have one tap. Therefore, each duplex would require two (2) taps. The $7000 per tap estimate was determined by dividing total estimated cost of $9 million by 1296 taps. Petitioner Boltach was assessed seven (7) taps (benefits), one single family residence and three duplexes at two benefits each. Seven (7) residences west of Dexter-Pinckney Road were removed from the assessment district by a vote of the township board and petitioners herein petitioned to be removed from the district but their removal was not approved by the township trustees.

The majority of the parcels in the district involve small lakefront lots, many of which currently are subject to Health Department (Bureau) water flow restrictions and some are in fact limited to seasonal use only. Generally, the lakefront properties' septic systems were no longer adequate and some properties faced what were described as "unsolvable septic problems" without the development of a sanitary sewer system.

All of the petitioners are off lake properties in the Portage Heights subdivision (hereafter PH Sub) except petitioners Boltach who own a farmhouse and duplexes on "outlots" adjoining the subdivision to the south. Apparently, all of the petitioners, except perhaps Boltach, have access to the lake via easements or other lots.

Health Department officials who testified indicated support for the project as a public health improvement and indicated a municipal or community sanitary sewer

system is always preferable to individual septic systems. State law requires sanitary sewer hookup if a sewer line comes within 200' of the property. See MCL 333.12751(a). The petitioners' properties are up gradient from Portage Lake but no clear evidence exists to show they are polluting the lake. However, some evidence does appear in the record indicating that there are some lakeshore properties that have or are polluting the lake.

Mr. Johnson of the Health Department observed from his experience that sanitary sewer installations around Whitmore Lake and Horse Shoe Lake in the county resulted generally in the lake water quality improving, improvement of the properties in the area by the fixing up of homes, more of which became full year residence and a general upgrading of area properties. Further, he indicated that the seven properties west of Dexter-Pinckney Road that were removed from the assessment district should not have been.

The petitioners who testified each indicated they did not believe their property values were being increased by being required to be a part of the Special Assessment District. They generally indicated they have good septic systems which they expect will operate efficiently for many years, and they have adequate area within their lots for the required additional "backup septic field" (as required by ordinance) should they experience a failure. Some of the petitioners indicated they would experience a loss as a result of being required to tap-in to the community sanitary sewer because of additional costs to tap-in and hookup and operating fees.

Mr. Hendrik Schuur, appraiser, did an analysis of single family residential sales and as a preliminary opinion based upon "mathematical means" opined that a "typical" PH Sub single family property would experience an increase in value equal to or greater than $7000 (see P-10). He limited his opinion by indicating an estimate of the exact value increase for a particular property would require a before-and-after appraisal and no such appraisal was done for single family homes in this case. Exhibits P-10A (Boltach Duplexes) and P-10B (Gaida Duplex) were introduced at the reconvention of the hearing on August 28, 1991 and involved before and after appraisals based upon the discounted cash flow income approach to value. Mr. Schuur opined a loss in value for the Boltach duplexes (three buildings - six units requiring six sewer benefits at $7000 each - currently non-conforming septic as only one system per duplex when each unit is required to have its own septic system) ranging from $18,000 to $30,000 (testimony indicated $27,000) depending upon certain assumptions regarding the costs to tap-in and whether or not the on-site septic system is a legally conforming or nonconforming use. The Gaida duplex was also valued using a discounted cash flow income approach and depending upon certain assumptions regarding "costs" to tap-in and conforming or nonconforming septic systems opined a lost in value ranging from $4000 to $5000. Testimony indicated an error was made in allocating tap and the Gaida duplex was assigned only one tap (benefit). The Gaida duplex involves a 1/2 acre lot and one septic filed for both units. The current ordinance dealing with septic systems requires a minimum of a one acre lot,

compliance with setback requirements from neighbors and lakes, etc., a septic drain field and alternate space for a backup drain field and at least 100 foot separation between well and drain field.

Engineer Raymond Smit explained that this sanitary sewer project was intended to serve existing dwellings in and around the lakes and that the township did not intend on expanding the sewer system to any new vacant areas for development. He indicated that as far as he knew PH Sub was a part of the assessment district from the beginning plans of the project and should be a part of the district and that the seven properties that were removed from the district should not have been removed. He opined a list of benefits to be associated with the installation of a public sewer system to include: (1) saving the need for space in building lot for septic drain fields (original and back-up); (2) waste water treatment assurance and peace of mind; (3) there is "value: in the public service system versus on site septic system; (4) community public health is improved and enhanced; (5) water quality of the lakes is improved and cleaned up; (6) reduces nutrients flowing into lakes - reducing eutrophication; (7) reduces potential health problems for swimmers. Generally his experience indicates after a few years of having a public sewer system the quality of the lake improves, property upkeep improves and is cleaned up and property values increase. A public or municipal sewer system in general is either provided or it is not within a geographic area of need. You do not hopscotch around within a district area. In other words, it is a community program or project for

all or none and individual property owners cannot opt to be in or out.

Conclusions of Law

The basic theory of special assessment as cited in **Fluckey** v **City of Plymouth**, 358 Mich 447; 100 NW2d 486 (1960) is set forth in **Cooley on Taxation** (3rd ed.), pp 1153 and 1154, as follows:

> The general levy of taxes is understood to exact contributions in return for the general benefits of government, and it promises nothing to the persons taxed, beyond what may be anticipated from an administration of the laws for individual protection and the general public good. Special assessments, on the other hand, are made upon the assumption that a portion of the community is to be specially and peculiarly benefited, in the enhancement of the value of property peculiarly situated as regards a contemplated expenditure of public funds; and, in addition to the general levy, they demand that special contributions, in consideration of the special benefit, shall be made by the person receiving it.
>
> The justice of demanding the special contribution is supposed to be evident in the fact that the persons who are to make it, while they are made to bear the cost of a public work, are at the same time to suffer no

pecuniary loss thereby; their property being increased in value by the expenditure to an amount at least equal to the sum they are required to pay.
(Emphasis added.)

See, also, the discussions of the problem in **City of Detroit** v **Weil**, 180 Mich 593; 147 NW 550 (1914), **Powers** v **City of Grand Rapids**, 98 Mich 393; 57 NW 250 (1894), **Long** v City of Monroe, 265 Mich 425, 430 (dissenting opinion); 251 NW 582 (1933), and **New York Central R Co** v **City of Detroit**, 354 Mich 637; 93 NW2d 481 (1958).

It must be stressed that the facts before us do not involve a mere error in judgment on the part of assessing authorities. We do not trifle with such. Nor do they involve the substitution of the judgment of the court upon the worth of special benefits conferred.

The assessors, not the court, weigh the benefits, if, in truth, there are benefits to be weighed.

See also **Blades** v **Genesee County Drain District No 2**, 375 Mich 683; 135 NW2d 243 (1965) and **Brill** v **City of Grand Rapids**, 383 Mich 216; 174 NW2d 832 (1970).

Further, this hearing officer cites with approval those cases establishing the principle that special assessments are presumed to be valid, Konfal v Delhi Township, 91 Mich App 147, 283 NW2d 677 (1979); Production Tool Supply Co v City of Roseville, 74 Mich App 34, 253 NW2d 350 (1977). And whether there is no benefit, or the amount of benefit, is peculiarly a decision best made by the legislative body imposing the assessment. Courts should be reluctant to interfere in this legislative determination unless there is fraud, mistake, or abuse of discretion. **Power** v **City of Grand Rapids**, supra; **Frischkorn Investment Co** v **City of Detroit**, 257 Mich 546; 241 NW 903 (1932), **Graham** v **City of Saginaw**, 317 Mich 427; 27 NW2d 42 (1947).

This hearing officer also cites and considers herein the 4 to 3 Supreme Court decision in **Dixon Road Group** v **City of Novi**, 426 Mich 390; 395 NW2d 211 (1986) wherein the majority recognized that

> decisions made by municipalities with respect to special assessments generally should be upheld. This court will intervene where there is a substantial or unreasonable disproportionality between the amount assessed and the value which accrues to the land as a result of the improvement. The cost of the improvements is approximately 2.6 times the increase in the value of the properties. **Dixon**, **supra**, page 403.

This case involved road improvements, water mains and storm sewers and an assessment of $13,236.81

per acre or $264,736.16 for Novi land and $38,769.11 per acre or $765,302.33 for the Dixon Road land.

The basic test to be applied is as set forth in Soncoff v City of Inkster, 22 Mich App 358; 177 NW2d 243 (1970) when citing 63 CJS Municipal Corporations, sec. 1371, page 1128 as follows:

> That the existence of a special benefit necessary to allow a special assessment may be found where the improvement results in an increase in value, a relief from an existing burden, or the creation of a special adaptability in the land.

This language as cited in Soncoff is truncated and the court in Dixon refers to possible misinterpretation thereof and refers to the full sentence form CJS as follows at page 400 of **Dixon**:

> Property is specially benefited within the meaning of the law governing special assessments where the improvement would increase the value of the land, relieve it from a burden, or make it specially adaptable to a purpose which enhances its value, and where the assessment is fair, having regard to the value of realty benefited, and is proportioned to the property assessed, the assessment will be deemed proper. (Emphasis original.)

The issue to be decided on these facts is whether or not petitioners herein were specially benefited from the special assessment project as measured by an increase in the value of the property and that the increase is reasonably proportional to the cost assessed.

This hearing officer, upon due, careful and deliberate consideration of the testimony, exhibits, arguments and briefs of counsel concludes that petitioners were specially benefited by this sanitary sewer special assessment project and the value enhancement realized by petitioners is not unreasonably disproportionate to the cost.

A presumption of validity in the special assessment as approved by the local unit of government exists and the burden of refuting that presumption lies with petitioners. On these facts, petitioners owning single family residences have failed to provide evidence of the value estimates of their property before and after the sanitary sewer project, except for petitioners' statements at hearing that they didn't believe the value would increase as a result of the sewer project and some said the value might decrease. These statements were apparently not supported by an analysis of sales information or other sales data. Appraiser Schuur on behalf of respondent opined, based upon a sales analysis and averages, that the single family homes within the petitioner's group would experience an increase in value of at least $7000 each as a result of the sanitary sewer project. This analysis was supported by sales data but lacked any specificity as to any particular property. At the hearing Mr. Schuur was identified and recognized as an independent fee appraiser and that he was expressing an independent opinion based upon his analysis and it wouldn't make any difference who had hired him. Appraiser Schuur, post initial hearing, was engaged to do an analysis of value on the Boltach and Gaida

duplexes and exhibits P-10A and P-10B were admitted and his testimony was taken relative to his duplex value analysis. This hearing officer finds that relative to the duplex analysis Mr. Schuur did an incomplete appraisal in limiting himself to a discounted cash flow income approach. Case law and other references are clear:

> All three approaches should be used whenever possible, and an appraisal which disregards an approach by mere statement and without research justifying non-use is considered incomplete.

See the State Tax Commission Assessors Training Manual, ch VII, p 34l also The Appraisal of Real Estate, 9th ed, American Institute of Real Estate Appraisers, 1987, p 61-65; Meadowlanes LDHA v City of Holland, 437 Mich 473 (1991).

These authorities and relevant case law require that all three approaches - cost, income and market - be utilized in the valuation process. This hearing officer concludes that by limiting himself to the income approach appraiser Schuur did nothing more than an incomplete analysis resulting in showing that when you increase expenses (for the costs of the sanitary sewer) thereby reducing net income, when capitalized you will receive a result which indicates a lower valuation. It is a mathematical surety, no other answer is possible in this situation (expenses increased) when the process is limited to the income approach. This hearing officer specifically rejects Mr. Schuur's resulting conclusion that a loss in the value of duplexes results from the installation of the sanitary sewer because he did an incomplete appraisal. This hearing officer believes and

finds as Mr. Johnson and Mr. Smith testified and Mr. Schuur's appraisal of single family homes indicates that the installation of a sanitary sewer will increase property values generally (according to the Schuur analysis an average of $7000 per unit) and is probably equally applicable to the duplex properties as well. Having so determined it appears to this hearing officer that a special benefit on average equal to the assessment of $7000 per benefit exists as best can be determined from the limited valuation information provided in this record.

Special assessment determinations are peculiarly legislative in nature and within the purview of local authorities, absent fraud, mistake or abuse of discretion (such that produces a disproportionate result per **Dixon**, **supra**) none of which appear in the facts of this case. Therefore, having determined petitioners' properties were specially benefited and that no fraud, mistake or abuse of discretion that adversely affected any of the petitioners herein, it is concluded that the special assessments herein should be affirmed.

Judgment

IT IS ORDERED AND ADJUDGED that the special assessments levied against petitioners be and are AFFIRMED and these appeals are DISMISSED.

IT IS FURTHER ORDERED AND ADJUDGED that the parties to this cause of action shall have 20 days from the date of entry of this Proposed Judgment to file exceptions and written arguments with the Tribunal

consistent with Section 81 of the Administrative Procedures Act [MCL 24.281; MSA 3.560(181)]. The parties in presenting exceptions and written arguments shall limit them to the evidence and testimony presented to the hearing officer. This Proposed Judgment together with any exceptions and written arguments shall be considered by the Tribunal in arriving at a final decision in this matter pursuant to Section 26 of the Tax Tribunal Act [MCL 205.726; MSA 7.650(26)].

MICHIGAN TAX TRIBUNAL

By, James R. Neumann

Entered: June 5, 1992

Court of Appeals, State of Michigan

Order

MICHAEL J. KELLY

Docket Numbers

Presiding Judge
MARILYN KELLY

155781 and 156507

KATHLEEN JANSEN
Judges

Joseph Boltach, et al v. Dexter Township

The Court orders that the motion to affirm pursuant to MCR 7.211(C)(3), is DENIED for failure to persuade the Court that it is manifest that the questions to be reviewed are so unsubstantial as to need no argument or formal submission or were not properly raised.

Seal
Michigan
Court
Of Appeals

A true copy entered and certified by Ella Williams, Chief Clerk, on

October 25 1993 /s/ Ella Williams
Date Chief Clerk

Court Of Appeals, State Of Michigan

ORDER

Clifford W. Taylor
Presiding Judge

Joseph Boltach v Dexter Township

Docket Numbers 155781 and 156507

Richard Allen Griffin
William G. Schma
Judges

The Court Orders that the motion for rehearing is DENIED.

Seal
Michigan
Court
Of Appeals

A true copy entered and certified by Ella Williams, Chief Clerk, on

May 30 1995
Date

/s/ Ella Williams
Chief Clerk

Michigan Supreme Court
Lansing, Michigan

Order
Entered: March 29, 1996

Docket Number 103401

James H. Brickley
Chief Justice
Charles L. Levin
Michael F. Cavanagh
Patricia J. Boyle
Dorothy Comstock Riley
Conrad L. Mallett. Jr.
Elizabeth A. Weaver
Justices

JOSEPH P. BOLTACH AND ABRAHAM V WILLIAMS, JR.,
Plaintiffs-Appellants,
v
DEXTER TOWNSHIP,
Defendant-Appellee.

On order of the Court, the motion to strike is considered, and it is DENIED. The application for leave to appeal is also considered, and it is Denied because we are not persuaded that the questions presented should be reviewed by this Court.

Seal Michigan Supreme Court

I, Corbin R. Davis, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.
March 29, 1996 /s/ Corbin R. Davis

Leave Denied

Michigan Supreme Court
Lansing, Michigan
Docket Number 103401

Order
Entered: June 18, 1996

James H. Brickley
Chief Justice
Charles L. Levin
Michael F. Cavanagh
Patricia J. Boyle
Dorothy Comstock Riley
Conrad L. Mallett. Jr.
Elizabeth A. Weaver
Justices

JOSEPH P. BOLTACH AND ABRAHAM V WILLIAMS, JR.,
Plaintiffs-Appellants,
v
DEXTER TOWNSHIP,
Defendant-Appellee.

On order of the Court, the motion for reconsideration of this Court's order of March 29, 1996 is considered, and it is DENIED, because it does not appear that the order was entered erroneously.

Seal
Michigan
Supreme
Court

I, Corbin R. Davis, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

June 18, 1996 /s/ Corbin R. Davis

State Of Michigan
Michigan Tax Tribunal

Lawrence Baughn, et. al
Petitioners,
v
Dexter Township
Respondent.

Docket Numbers

124693 through 124709

[Attorney information omitted]

1. All Petitioner's except Joseph P. Boltach are residents of the part of Dexter Township known as Portage Heights Subdivision.
2. Joseph P. Boltach is a resident of Dexter Township in the land adjoining, but south of the Portage Heights Subdivision.
3. On April 18, 1989, the Dexter Township board approved a special assessment on Petitioner's subject property.
4. Exhibit 1, attached, is a complete list of parcel I.D. numbers, the number of taps assigned to the parcels, the Tax Tribunal Docket numbers and Petitioner's names for each subject property.
5. The special assessment in controversy is $7,000 per sewer tap.

Events And Factual Basis

6. The minutes of the Dexter Township Board for February 3, 1987, indicate:

"Moved by Smith, supported by Eisenbeiser to cause the Township Supervisor and the Township Attorney to develop a preliminary

special assessment district for the propsed [sic] waste water treatment system sections 1 and 2, Portage Lake, Dexter Township and present same to the Township Board.

Yea-5, nay-0 Carried."

7. The minutes of the Dexter Township Board for May 19, 1987, indicate:

"Moved by Doeltzky, [sic] supproted [sic] by Smith to have the supervisor contact Putnam, Webster and Hamburg Townships regarding use of possible excess wastewater treatment capacity.
Carried."

8. The minutes of the Dexter Township Board for September 6, 1988, indicate:

"Moved by Doletzky, supported by Knight to authorize McNamee, Porter & Seeley to prepare an assessment roll, map and descriptions for the Portage Lake Sewer Authority.
Carried."

9. There is no evidence that McNamee, Porter & Seeley was provided with either general or specific instructions about how to establish the boundaries of the special assessment district, nor about how to allocate taps within the district.

10. During October, 1988, the Townships of Dexter, Putnam, Webster and Hamburg joined together and formed the Portage-Base Lakes Area Water and Sewer Authority (Authority) under the provisions of MCL 124.281 et. seq.; 1955 PA 233, (Public Act 233), and adopted Articles of Incorporation by action of their respective township boards.

11. Between December, 1988 and February, 1989, Dexter Township Board Supervisor Jim Drolett worked with the firm of McNamee, Porter and Seeley to prepare a special assessment role.
12. Petitioner's property was included in the preliminary special assessment role.
13. At the time the petitioner's property was included in the preliminary special assessment district, there was no evidence that any of the Petitioners' properties had active [septic] system problems.
14. At the time the petitioner's property was included in the preliminary special assessment district, there was no evidence that any of the Petitioners' properties were in violation of any public health code.
15. At the time the petitioner's property was included in the preliminary special assessment district, there was no evidence that any of the Petitioners' properties were emitting any harmful effluent.
16. At the time the petitioner's property was included in the preliminary special assessment district, there was no evidence that any of the Petitioners' properties were emitting effluents of any kind that contributed to the pollution of either Portage Lake, or Little Portage lake.
17. At the time the petitioner's property was included in the preliminary special assessment district, there was no evidence that any of the Petitioners' had a septic system that created any health risk to the [sic] any of the Petitioners' property's occupants.

18. At the time the petitioner's property was included in the preliminary special assessment district, there was no evidence that any of the Petitioners' properties had a septic system that created any health risk to occupants of neighboring properties.

19. The minutes of the Dexter Township Board for February 7, 1989, indicate:

"Moved by Doletzky, second by Knight to adopt a resolution to establish a public hearing date and time, and causing the Clerk to file notice of same in a newspaper of general circulation in the District and send first class mail notices to owners of or persons in interest in property in the Special Assessment District.

Yes - Smith, Doletzky, Knight, Drolett, Eisenbeiser

No - None"

20. As of February 7, 1989, there was still no evidence that any of the Petitioners' properties should be included in the special assessment district.

21. The minutes of the Dexter Township Board for March 21, 1989, indicate:

"Mary Ann Hitchcock - 9815 Betty Place, Pinckney, presented a petition - 28 signatures."

22. At the time the petition was received, Dexter Township Board could not proceed with the sewer project if it were to lose the more than $200,000 income to be generated by the Portage Heights Subdivision.

23. At the time the petition was received, had Dexter Township not been able to participate in the sewer project due to an inability to finance its share of the project's cost, the entire four-township project would have been jeopardized.

38. In order to avoid the need for an additional ad valorem property tax, the Dexter Township Board attempted to find a way to fund the sewer that would not require voter approval.

39. In that effort, Dexter Township passed a resolution requesting that Washtenaw County study, design, construct, operate, manage and finance a sewer system for Portage Lake residents under the provisions of MCL 123.731 et. seq.; 1957 Public Act 185 (Public Act 185).

40. Washtenaw County subsequently decided to exercise its authority under the provisions of Public Act 185.

41. The Dexter Township Board has repeatedly presented three reasons, and only three reasons for desiring to build the proposed sewer:

    A. To protect the quality of the public's navigable waters known as Little Portage Lake, Portage Lake, Base Lake, and the Huron River;

    B. To protect the public health, safety and welfare:

    C. To provide a special benefit to property owners who have or who are likely to have inadequate or failed septic systems and who are or who likely will be, due primarily to lot size and ground characteristics, unable to install adequate septic systems.

42. The characteristics of the properties that will be specially benefited by the proposed sewer have been described by the Washtenaw County Health Department and by Respondent as with many of the following characteristics:

A. Less than 100 feet from surface water such as Portage Lake;

B. Lot size so small that there is no room for an adequate drain field;

C. Lot size so small that there is no way to achieve adequate separation distances (distance between the drinking water well and any of several other objects, such as the drain field, the septic tank, the property line, etc.)

D. Presently have failed or failing septic systems, no septic systems at all, or septic systems with a capacity below minimum standards.

E. Structures, including septic systems, are more than 40 years old.

F. Lots are located in an area where the water table is near ground level.

G. Lots where the soil type is not suitable for proper septic system operation.

H. Lots with buildings and septic systems originally built for seasonal use. Although many of the buildings were altered for year round use, the septic systems, in many cases, were not upgraded accordingly.

43. The Washtenaw County Health Department and Respondent have continually pointed to the lake front properties and the second tier of houses

back from the lake as examples of properties that will be specially benefited by the sewer.

44. The Petitioners properties have most of the following characteristics:

A. Minimum distance to surface water such as Portage Lake is in excess of 150' feet. The average distance is far in excess of 200'.

B. Lots are so large that most have room for two adequate drain fields. All lots have sufficient room for at least one adequate drain field.

C. Lots are so large that they meet applicable code requirements for separation distances. Many meet or even exceed the current code requirements.

D. Lots presently have septic systems which meet or exceed applicable codes. Many meet or even exceed the current code requirements.

E. Lots presently have septic systems whose life expectancy is greater than the Michigan Department of Natural Resource's estimate of the life expectancy of the presently designed sewage treatment facility.

(Michigan Department of Natural Resources computes that the system as presently designed will violate the discharge permit after 14 to 17 years when the ground between the effluent discharge and Little Portage Lake can no longer absorb the pollutants the system will emit.)

F. Lots presently have septic system capacity far above the capacity provided per tap by the proposed sewer system.

G. Structures, including septic systems, are less than 30 years old.

H. Lots are located in an area where the water table is so high that the houses have full or partial basements.

I. Lots have the soil type that is ideal for proper septic system operation.

J. Lots have buildings and septic systems that were designed and built for year round use.

45. Dexter Township Board Supervisor, Jim Drolett, has claimed that the primary reason for including the Petitioners' property in the special assessment district is that Petitioner's use the lake.

46. No petitioner presently presents a health risk to themselves, their neighbors, those who use the chain of lakes nor the general public.

47. Respondent has yet to provide any verified evidence that any petitioner presently presents a health risk to themselves, their neighbors, those who use the chain of lakes nor the general public.

Count 1

48. Dexter Township's February 20, 1990 resolution provides as follows:

> "2. All resolutions and parts of resolutions insofar as they conflict with this resolution be and the same are hereby rescinded."

49. That same resolution indicates the Dexter Township Board's finding "that is impractical and financially unsound" to proceed under Public Act 233.

50. Dexter Township Board's Special Assessment Roll Resolution 3 provides funding only for a sewer system to be designed, constructed, operated, maintained and financed by the Authority under Public Act 233.

51. Washtenaw County's decision to build the sewer under the provision of Public Act 185 provides the County with exclusive jurisdiction over all questions relating to design, construction, operation, maintenance and financing of a Washtenaw County sewer to serve the Portage Lake are residents.

52. Because Respondent's Special Assessment Roll Resolution #3 is inconsistent with its February 20, 1990 resolution, it is rescinded.

Count 2

53. 1957 Public Act 185 vests Washtenaw County with exclusive authority to determine the method of financing public improvements it is authorized to acquire.

54. Because the system is being built by the County under Public Act 185 and is not being built by the Authority under Public Act 233, Respondent has no legal authority to levy a special assessment.

Count 3

55. Under Public Act 233, if Dexter Township desires to finance a public improvement by means of a special assessment, the special

assessment must conform to the requirements of MCL 41.721 et. seq.; 1954 PA 188 (Public Act 188) except that "a petition shall not be required from property owners. Public Act 233 § (a).

56. Public Act 188 § 4 provides:

(1) the township board, if it desires to proceed on the improvement, shall cause to be prepared plans describing the improvement ...

(2) The township board shall fix a time and place to meet and hear any objections ... to the improvement, and to the special assessment district, and shall cause notice of the hearing to be given as provided in section 4a.

(3) ...

(4) ... If at any time during the term of the special assessment district an actual incremental cost increase exceeds the estimate therefore by 10% or more, notice shall be given as provided in section 4a and a hearing afforded to the record owners of property to be assessed.

57. Respondent's hearing notice is defective because the improvement that is being built by Washtenaw County is not the one described in Respondent's hearing notice.

58. The sewer system that is being built is not the one described in Dexter Township's special assessment resolution because:

A. It is being built by Washtenaw County, not the Authority.

B. It is being funded by Washtenaw County, not by the Authority.

C. It is being built under authority provided by Public Act 185, not under authority provided by Public Act 233.

D. The Authority continues to lack a valid contract to do anything.

E. The estimated cost of the county sewer is not less than $1.1 million dollars higher than the estimated cost of the Authority's former sewer proposal.

59. Respondent's hearing notice failed to indicate that Respondent would hear objections to either proposed improvement.

60. Respondent failed to provide a hearing as required by Public Act 188 § 4 (4).

61. Because Respondent has failed to comply with applicable law, its special assessments against Petitioners' properties are void.

Count 4

62. By July 21, 1988, McNamee, Porter & Seeley had already estimated the project cost to be approximately $9,000,000.

63. Respondent had also determined that the special assessment had to be kept at $7,000 or less in order to be affordable.

64. Respondent had planned since 1986 to finance the entire project through special assessments.

65. In order to be able to raise its portion of the proposed project cost, it was necessary for Dexter Township to allocate 420 taps.

66. Petitioners were included in the special assessment district solely to generate revenue.

67. Because no special assessment statute authorizes the Respondent to use a special assessment tax as a means of raising revenue for public use, Respondent's special assessment is invalid as to all Petitioners.

Count 5

68. Because Petitioner's are being taxed to provide a general benefit to the general public, and to provide a special benefit to owners of property on or near the lake, they are being deprived of private property, specifically both cash and their functioning septic system, for a public purpose.
69. Under both United States and Michigan's constitution, Respondent's act is an inverse condemnation of Petitioners' property.
70. Under both United States and Michigan's constitution, Respondent's act is illegal unless Respondent provides substantive due process to each Petitioner, and then provides just compensation to the Petitioner's.
71. Neither Public Act 185 nor Public Act 233 provide Petitioner's with the substantive due process required by either constitution.
72. Respondent's have not provided Petitioners with just compensation for their property losses.

Count 6

73. Public Acts 185 and 233 provide a mechanism for special assessment only against those property owners who are specially benefited by a proposed improvement.
74. Neither Public Act 185 nor Public Act 233 authorize the use of special assessments for public improvement projects beyond the extent

to which particular land owners receive a special benefit.

75. The United States, the State of Michigan, Washtenaw County and the Dexter Township Board have all declared that the general public has a major interest in protecting lake water quality.

76. The State of Michigan, Washtenaw County and the Dexter Township Board have all declared that the general public has a major interest in protecting the quality of the water in the Chain of Lakes, including Base Lake, Little Portage Lake, and Portage Lake.

77. The State of Michigan, Washtenaw County and the Dexter Township Board have all declared that the one most important reason for providing a sewer in the Portage Lake area is to protect lake water quality.

78. Nevertheless, Respondent allocated no portion of the project cost to the general public.

79. Washtenaw County and Respondent have each repeatedly declared that another important reason for building the County's sewer is to provide relief to those property owners who are or will be unable to adequately process the waste water generated on their property.

80. Nevertheless, Respondent allocated the same portion of the project cost to those who will have a deed restriction removed as to those who will never need a sewer.

81. Respondent also allocated the same portion of the project cost to those who will be able to develop presently unbuildable properties as to those who's property is already developed.

82. Because Respondent failed to distribute the benefits and burdens of the proposed improvement according to any rational basis, if the Tribunal determines that petitioners should remain in the district, the amount of each Petitioners' special assessment should be redetermined after the benefits are properly distributed.

Relief Requested

* * *

Respectfully submitted,

Dated: December 7, 1990

Joel S. Welber (P 23082)
Attorney for Petitioners

MR. WELBER: Now, what you're about to hear concerns a proposed sewer going into the Portage Lake community. And the history of this sewer is – is a dynamic history. By that I mean that the legal foundation of the sewer has changed even from the time that this special assessment district, in which my clients are included, was confirmed.

And, just by way of background, although it's not necessarily germane to the issues in this case, this was initially intended to be a sewer constructed under Public Act 233, and based upon a combination of four townships, Dexter being one of them. Two of the four townships located in Livingston County and two in Washtenaw County.

After the special assessment district was confirmed – and indeed, after the petitions were filed in this Tribunal – there would had – there was a voter referendum.

The project, as a result of this referendum, was switched to a sewer that is owned and constructed by Washtenaw County under Public Act 185.

We are not challenging the statutory basis for the inclusion of these Petitioners under Public Act 145, as opposed to Public Act 233. And the technical arguments that we previously raised in our petition, are not being pursued at this point.

But we will prove a more important proposition. Specifically, that these Petitioners should not substantively be included in this sewer project under any statute.

Petitioners contend, and we will prove, that there is no rational basis for the inclusion of these Petitioners in this sewer and that, at the time of the confirmation of

the sewer assessment district, the Dexter Township Board of Trustees neither adopted nor employed any rational standard under which the Petitioners would be so included.

As a result, we will request that the Tribunal void the special assessments attached to Petitioners' property, as having no legal basis under any statute, since there's no governmental body that has -- that has included them in conformance with any rational standard or -- or a standard that can be articulated by that body.

Petitioners will also prove that since there is no rational basis for their inclusion, the only conclusion that can be drawn from the fact that they are included, is that they were included to generate revenue for this project.

Since we will ask the Tribunal to make this finding, we will further ask the Tribunal to void the special assessment as a matter of law, since a special assessment cannot generally be used to raise revenue -- or, raise general revenue.

Petitioners will further prove that they will receive no special benefit that is required to justify the assessment as a matter of law. Even if they were lawfully included, we will prove that they do not specially benefit from this sewer as is required by law of the state.

None of the Petitioners' property is being relieved of a burden. None of the Petitioners' property is becoming suitable for a higher or better usage. And none of the Petitioners' property will increase in value as a result of this assessment and benefit.

In fact, Petitioners will prove that they, unlike others within the assessment district, will be burdened

by this sewer as it will result in a taking of their functioning, self-contained, disposal systems which are septic and drainfield, and will replace those systems with a more restrictive sewer.

This constitutes a taking of the property for public benefit without compensation.

Petitioners will prove that they will receive no benefit as a matter of law through an increase in property value. In doing this, Petitioners will show that the appraisal of their properties which suggest an incremental increase in value, is inaccurate and based upon incorrect factual assumptions.

Petitioners will show that at best, the transaction will be awash from a financial standpoint, thus no special benefit will be realized as a matter of fact and law. Petitioners will further show that even within the assessment district, the benefits are improperly allocated for at least two reasons.

The first reason, is that indetiful -- identifiable properties which will benefit disproportionately to other identiful -- identifiable properties, are assessed at the same rate. And this is legally impermissible.

Second, and more crucially, no portion of the cost of this project has been allocated to the general public, not withstanding a clear public benefit that will be repeatedly proven through the testimony.

That is our position and we're ready to begin taking evidence in support of the petitions.

Excerpts From
Petitioners Closing Argument

Respondent's failure to develop a specific standard made it easy and likely that it would overlook important sources of evidence. It also made it easy and likely the Respondent would misunderstand or misinterpret the evidence it did have. Failure to develop a rational standard made it easy and likely that Respondent's ultimate decisions on the question would be arbitrary and without either factual or legal support.

* * *

Because Respondent failed to follow the established procedure, particularly the part requiring the development of a reasonably precise standard for inclusion, Respondent not only denied Petitioners of several federal and state constitutional rights and failed to comply with the technical requirements of the applicable statutes, but it also taxed Petitioners at an unlawful rate for an economic benefit that Respondent's expert proved they are not likely to receive. Petitioner's Closing Argument, p 5.

"In addition, to comply with Equal Protection guarantees of the federal and state constitutions, the administrative standards must be developed using classifications that are based on naturally distinguishing characteristics, and are applied such that all members of each classification are treated similarly. [State cite] **Allied Stores of Ohio** v **Bowers**, 358 US 522; 79 Sct 437; 3 LEd2d 480 (1959).

* * *

"Upholding the constitutional requirements of uniformity and equality is the just and ultimate purpose of the law. **Sioux City Bridge Co** v **Dakota County**, 260 US 441; 43 SCt 190; 67 LEd 340 (1932), **Armco Steel**. Closing, p 11.

Petitioners argue that because Respondent had already decided to tax all properties at a flat rate of $7,000 per tap, it never even considered the question of benefit in terms of dollar value. As a result, it made three serious errors:

1. It failed to allocate a portion of the burden of the project to the general public in proportional [sic] to the benefit the general public is expected to receive;
2. It failed to allocate the remaining portion of the burden between the property owners in proportion to the relative special benefit each property owner was expected to receive;
3. If failed to exclude from the assessment district or from the tax roles at least, those properties, including the Petitioners, who will receive an economic burden rather than receiving a special benefit attributable to the sewer." Closing, p 28.

"Distribution of the burden of a local public improvement is controlled by four constitutional guarantees: Due Process, Equal Protection, Just Compensation, and Uniformity of Tax. Each special assessment statute contains specific instructions consistent with these constitutional guarantees." Closing, p 46.

"The second test is whether the burden changes in reasonable proportion to the change in benefit each property receives. ... **Crampton**, 362 Mich 503, 520; 108 Nw2d 16, 25 (1961), quoting 48 AmJur 618."

* * *

"The third test is derived from the Equal Protection Clause of the Michigan and Federal Constitutions, and the Uniformity of Tax Clause of the Michigan Constitution... Closing, p 50.

Excerpts From Memorandum In Support Of Petitioners Exception To Proposed Judgment

"Petitioners introduced evidence that:

1) Although the proposed sewer project was implemented to protect the public's interest in pristine recreational lakes and rivers, Respondent allocated zero percent of the project cost to the general public.

2) Although the value of the sewer to [sic] would vary significantly from property to property, the Respondent allocated the burden of the project on a per tap basis.

3) Respondent arbitrarily confirmed its special assessment district without developing a rational standard for the decision and without developing a reasonable factual basis for its decision.

...

Each of these errors is a separate violation of Petitioners' federal and state constitutional rights to equal protection, due process and just compensation for property taken for a public purpose. ..." Memorandum, unnumbered page 2.

Excerpts From
Petitioners' Brief On Appeal

"Principle Points of Argument:

Duty to perform constitutional and statutory legal duties as a condition precedent to valid exercise of authority. 10

Duty to distribute special assessment burdens within the district as required by the constitution and statute. 13

Duty to distribute proportion of burden to general public as required by the constitution and statute. 22

Duty to provide substantive due process as required by constitution and stature [sic] 25

Duty to base decisions on competent, material and substantial evidence on the whole record. 31

Brief, p i.

The Equal Protection guarantees of the federal and state constitutions also require the use of the process dictated by the legislature:

> 'Where an ordinance fails to include and affect alike all persons of the same class, and extends immunities or privileges to one part and denies them to others of like kind by unreasonable or arbitrary classification, the same is contrary to the equal protection guarantees of the State and Federal constitutions.' **Armco Steel** v **Dept of Treasury**, 419 Mich 582; 358 NW2d 839,

843 (1984), quoting **Beauty Built Construction Co**, 134 NW2d 214... .

Brief, p 19. (Same quote and citation appear under due process argument at page 27).

"Upholding the constitutional requirements of uniformity and equality is the just and ultimate purpose of the law. **Sioux City Bridge Co** v **Dakota County**, 260 US 666; 43 SCt 190; 37 LEd 340 (1923), **Armco Steel**.

Brief, p 21. (Same statement and citation appear under due process argument at page 29).

> "In our judgment, the exaction for the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, to the extent of such excess, a taking, under the guise of taxation, of private property for public use without compensation. ... [State citation omitted] quoting **Norwood** v **Baker**, 172 US 269; 19 SCt 187; 43 LEd 443.

Brief, p 36.

State Of Michigan
In The Court Of Appeals

JOSEPH P. BOLTACH et. al.
Petitioner-Appellants,
v
DEXTER TOWNSHIP,
Respondent-Appellee.

[Attorney names and addresses omitted]

Appellee's Motion To Affirm

Now comes Appellee, by and through it attorneys and moves this Court to issue an order affirming the judgment of the Michigan Tax Tribunal pursuant to the analysis provided by the Michigan Supreme Court in ***Kadzban***, et al. v ***City of Grandville***, ___ Mich ____ (Docket No. 92796) for the reasons addressed in the attached memorandum.

Respectfully submitted,

/s/ Peter C. Flintoft (P 13531)
Attorney for Appellee

* * *

Dated July 21, 1993

Excerpts From Petitioner's Michigan Court Of Appeals Motion For Rehearing

"22. As argued on appeal to this Court, appellants proved at the hearing that appellee failed to adopt any standard or rational basis for including appellants in the special assessment district, thereby depriving them of their property without the due process of law required by the Michigan and US Constitutions.

23. The question of whether appellants were denied their constitutional protection by appellee's failure to adopt and employ standards in determining whom to include in the special assessment district, and how to allocate the benefit and the burden between district residents themselves, and between district residents and the general public, is clearly and properly before this Court, having not been waived by appellants at any time."

Motion, p 6.

Excerpts From Plaintiff/Appellants' Application For Leave To Appeal To The Michigan Supreme Court

Appellants seek this leave to present four questions to this court. The questions are:

1) Does the use of a common law presumption of validity violate a petitioner's right to seek judicial relief from an alleged unauthorized special assessment pursuant to Const. 1963, Art. 6, § 28 and MCL 205.735(1)?
2) Does the use of a flat rate, "per tap" assessment of $7,000 deprive a petitioner of fundamental constitutional rights, where the evidence clearly and convincingly proves that the actual value of the tap varies substantially from one parcel to another parcel within the assessment district?
3) Does a township's failure to allocate any cost of a sewer project to the general public's benefit deny a petitioner his right to be free from unconstitutional takings under Art. 10, § 2 and applicable Michigan statutes?
4) Does a township's failure to create any standard to determine assessment boundaries and allocate benefits and burdens between the district's properties deprive a petitioner of her right to constitutional due process?

Application, unnumbered opening page.

Excerpts From Petitioners' Motion For Reconsideration And From Petitioners' Brief In Support.

"Petitioners ask this court to reconsider its March 29, 1996 decision ... for the reasons stated in the accompanying brief."

Petitioners Motion for Reconsideration, unnumbered first page.

"Argument

1. 15

When Petitioners present several specific claims of constitutional error concerning a township administrative resolution, the Michigan Supreme Court is charged with the duty to protect Petitioners' federal and state substantive due process rights by ensuring that each and every claim receives a judicial review and determination."

Petitioners Brief Support, page i.